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No. 76-773

In the Supreme Court of the United States

OCTOBER TERM, 1976

WENDELL GORDON AND BERTHA GORDON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the Court of Claims (Pet. App. A1-A3) is noted at 546 F. 2d 430 (table).

JURISDICTION

The final order of the Court of Claims (Pet. App. A1-A3) was entered September 10, 1976. The petition for a writ of certiorari was filed on December 7, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States must pay compensation when it removes, and uses in aid of navigation, material from the bed of a navigable stream.

STATEMENT

As part of the Smithland Locks and Dam Project on the navigable Ohio River, the United States condemned an island owned by petitioners. Compensation was paid to petitioners pursuant to the condemnation (Pet. App. A1). Petitioners continue to claim, under Kentucky law, an interest in the adjacent acreage of the island that lies between the ordinary high and ordinary low water marks (Pet. App. A2).

The United States has removed sand, silt and gravel from this area for use as fill in constructing the immediately adjacent Smithfield project; it has not compensated petitioners for the use of this fill (Pet. App. A2). The Smithfield project has for its purpose the improvement of navigation on the Ohio River for commercial and other water traffic.

Petitioners brought suit in the United States Court of Claims, seeking compensation under the Fifth Amendment for the alleged taking of their sand, soil and gravel by the United States; petitioners also sought recovery on a theory of implied contract under which the government would be required to provide petitioners with the value of the materials it removed (Pet. App. A2).

The Court of Claims granted the government's motion for summary judgment, and dismissed petitioners' petition. The court noted that all navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and that, although title to the shore and submerged soil is in the various States and individual owners holding under them, title is always subject to the navigational servitude created in favor of the federal government by the Constitution. The court held that projects undertaken by the government in aid of navigation are to be viewed in their entirety,

and that even if the government receives some collateral benefit from the project, such as use of sand and gravel, the acts of the United States remain within the power of the navigational servitude. The court concluded that the removal of sand and gravel from the river bed does not amount to a compensable taking of petitioners' property (Pet. App. A2-A3).

ARGUMENT

The decision of the Court of Claims is correct, and does not present an issue warranting further review.

It is well established that title to the beds of navigable rivers below the ordinary high-water mark is only a qualified title, at all times subordinate to the public right of navigation. The federal government's exercise of its dominant power over the bed of the river—for example, by removing impediments to navigation, widening channels, or erecting structures—is not an invasion of any private right in such lands, for which the United States must make compensation. Rather, any damage to the owner results from the lawful exercise of "a power to which that property has always been subject," the navigational servitude. *United States* v. *Chicago, M., St.P. & P.R. Co.*, 312 U.S. 592, 596-597; see, also, *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53; *Scranton* v. *Wheeler*, 179 U.S. 141, 150-151.

Petitioners argue, however, that while the United States may remove sand and gravel without compensating them, it may not utilize what it removes in a federal navigational improvement project unless it provides compensation (Pet. 5). Petitioners characterize this as an impermissible "commercial" use.

The taking of sand and gravel from petitioners' river bed land must be viewed in the context of the entire

Smithland Locks and Dam Project.[1] The boundaries of the project encompass petitioners' river bed lands. They cannot complain if part of the construction is carried out on those river bed lands. Similarly, the removal of construction materials from petitioners' lands, for use in the project, as an integral part of the project, is also permissible, pursuant to the federal government's power to control and aid navigation. Such removal does not require that petitioners be compensated. As this Court held in *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 62, "All means [with respect to the improvement of navigable rivers] having some positive relation to the end in view * * * are admissible."

Petitioners admit that the government could remove the sand and gravel without compensating them (Pet. 3). There is no reason why the outcome should be different if the United States saves money by transferring sand from one part of the project for use in another, rather than merely disposing of the sand in some other manner. Cf. *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 72-73 (if primary purpose of project is to benefit navigation, government may lease excess water power resulting from project without compensating river bed owner); *Kaukauna Co.* v. *Green Bay, etc., Canal Co.*, 142 U.S. 254, 273-276 (same conclusion with regard to state navigational project).

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[1]In determining whether an element of a navigation project constitutes a taking, the project in its entirety must be considered. See *United States* v. *Commodore Park*, 324 U.S. 386, 392-393. In that case, petitioner complained because the government took dredged materials from one body of navigable water and deposited them in another nearby body of navigable water, blocking a stream and damaging petitioner's interest as an owner of land about a mile from the fill. This Court held that the project had to be viewed as a whole, and that if the government had the power to dredge and fill in the first location, it could also fill in the second.

The result in this case is entirely consistent with the Court of Claims' holding in a similar case, *Coastal Petroleum Co.* v. *United States*, 524 F. 2d 1206.[2] In that case, limestone was being removed from a navigable body of water and used in a levee project on the same body. The court held that there had been no taking of property. The levee project was plainly covered by the navigational servitude, and the court held that the government could take minerals from the same navigable waters as part of and directly incident to the main work. Relying on *United States* v. *Commodore Park*, *supra*, the court looked to the entire project to determine if the removal of minerals was in aid of navigation.

Petitioners claim that the result in this case will permit the United States to mine sand and gravel whenever it wishes to generate revenues or use these in federal projects. But the Court of Claims found, and we contend in this case, only that use of gravel and sand from the bed of a navigable river is a permissible exercise of the navigational servitude in order to further a navigational project which encompasses the portion of river bed from which materials are removed.

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[2]Petitioners rely on *United States* v. *Louisiana*, 422 U.S. 13, and the Submerged Lands Act, 67 Stat. 29. But the Act reaffirmed the United States' retention of "all its navigational servitude" which "shall be paramount to * * * proprietary rights of ownership." 43 U.S.C. 1314(a); *United States* v. *Rands*, 389 U.S. 121, 127. *United States* v. *Louisiana* does not deal with a dispute about the navigational servitude.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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